JUN 7 1957
JOHN T. FEY, Clerk

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1956

## No. 1066

J. C. REYNOLDS and AGNES M. REYNOLDS, husband and wife, of Homer, Alaska,
*Petitioners,*

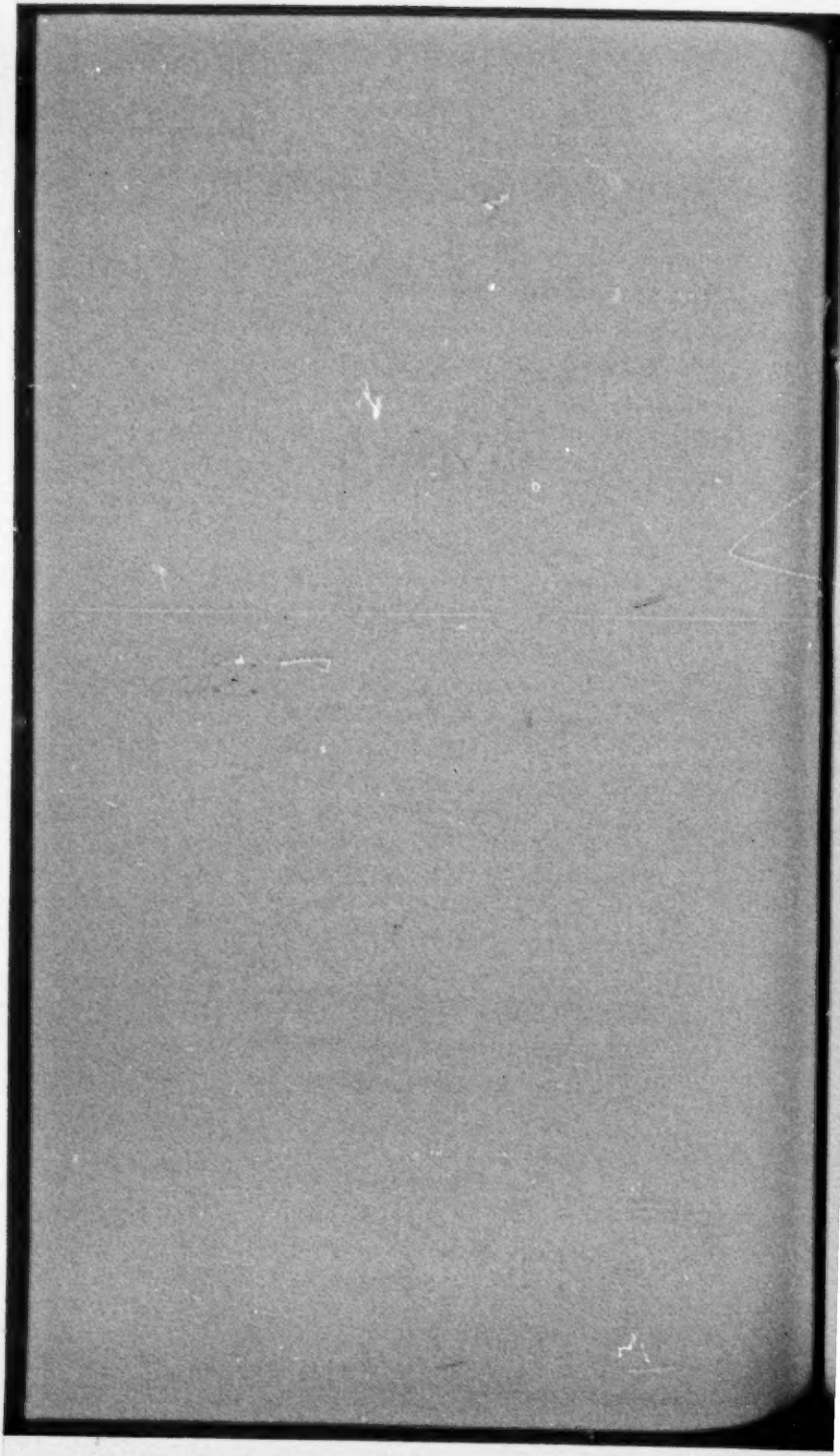
vs.

RAYMOND V. LENTZ and SHIRLEY LENTZ, husband and wife, of Homer, Alaska; BANK OF HOMER, a banking corporation, of Homer, Alaska; WILLIAM L. MATHEWS, of Homer, Alaska; and HENRY ANDERSON and ENI ANDERSON,
*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI**
**to the United States Court of Appeals**
**for the Ninth Circuit.**

BELL, SANDERS & TALLMAN,
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Parker-Walton Printing Co., San Francisco, California



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vs.

RAYMOND V. LENTZ and SHIRLEY LENTZ, husband and wife, of Homer, Alaska; BANK OF HOMER, a banking corporation, of Homer, Alaska; WILLIAM L. MATHEWS, of Homer, Alaska; and HENRY ANDERSON and ENI ANDERSON,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI
### to the United States Court of Appeals for the Ninth Circuit.

Your Petitioners, J. C. Reynolds and Agnes M. Reynolds, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Ap-

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peals for the Ninth Circuit, entered on April 4, 1957, and the final judgment denying the Petition for Rehearing, which order denying Petition for Rehearing was made and entered in said Court on May 7, 1957.

The Opinion is not yet officially published and reported but a copy of the Opinion, filed on April 4, 1957, is attached hereto and made a part of this Petition for Writ of Certiorari by reference and the judgment and record is printed and made a part hereof as an appendix hereof.

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**STATEMENT OF MATTERS INVOLVED.**

This action was filed by Petitioners J. C. Reynolds and Agnes M. Reynolds, in the District Court for the Territory of Alaska, Third Division, for the purpose of preventing a threatened forfeiture of a conditional sales contract for the purchase of the Yah Sure Club in Homer, Alaska, which grew out of a conditional sales contract which was originally executed by Raymond V. Lentz and Shirley Lentz for the sale of said property to Mr. and Mrs. Westergard, who are not parties to the action; which contract of purchase reached the possession and ownership of J. C. Reynolds and Agnes M. Reynolds.

On this contract for a Twenty Thousand Dollar ($20,000.00) purchase, the purchase price had all been paid except the sum of Seven Thousand Five Hundred Sixty-eight Dollars and Twenty-nine Cents ($7,568.29), and a new contract was entered into between Raymond V. Lentz and Shirley Lentz as Sellers and

J. C. Reynolds and Agnes M. Reynolds as Buyers, wherein the Reynolds paid in cash One Thousand One Hundred Nine Dollars and Seven Cents ($1,109.07) and agreed to make payments of One Hundred Fifty Dollars ($150.00) per month until the balance of Six Thousand Four Hundred Fifty-nine Dollars and Twenty-two Cents ($6,459.22) was paid, and to keep the property insured in the sum of Six Thousand Five Hundred Dollars ($6,500.00). The payments were to start July 1, 1954, but, before anything was due, large amounts of money were paid to the defendants Lentz, and, prior to the attempted forfeiture, the balance had been reduced by the payment of One Thousand Nine Hundred Twenty-nine Dollars and One Cent ($1,-929.01), in addition to the down payment of One Thousand One Hundred Nine Dollars and Seven Cents ($1,109.07). The agreement of sale and purchase was to be deposited by the Sellers in the Bank of Homer at Homer, Alaska, where the payments were to be made and the insurance policy to be delivered. *The Sellers did not make the deposit of the agreement in the Bank of Homer on the 8th day of April, 1954, as agreed, but did, about six months later, and in September of 1954, take the agreement to the Bank.* The payments were paid well in advance to Mr. Lentz, but the insurance policy was not issued until in October of 1954, and then only in the sum of Five Thousand Five Hundred Dollars ($5,500.00). The evidence on the plaintiff's part was to the effect that the Seller, Raymond V. Lentz, was drinking some, and wanted money shortly after the execution of the agreement, even though none was due, and that, on one occasion, he

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wanted Five Hundred Dollars ($500.00), and that J. C. Reynolds told him he couldn't let him have it because he had to buy the insurance with it, and that Lentz, by agreement, waived the issuance of the policy, stating that the building was then unoccupied, that he needed the money badly and that the insurance could be purchased later. Reynolds gave him the Five Hundred Dollars ($500.00), and did not buy the insurance policy until October, and by that time the equity of Raymond V. Lentz and Shirley Lentz had been reduced to where the equity did not equal Five Thousand Five Hundred Dollars ($5,500.00) and a policy, with the contract clause in it, for that sum was purchased and taken to the bank, and another policy of Five Thousand Five Hundred Dollars ($5,500.00) was purchased, with the contract clause in it also, payable to Raymond V. Lentz and Shirley Lentz, but was not deposited in the Bank.

Then Mr. and Mrs. Lentz were offered Ten Thousand Dollars ($10,000.00) for the property, if they could get it back from Reynolds. Then Raymond V. Lentz went to the Bank of Homer and demanded the papers, representing that the terms of the contract had been breached by failure to make the payments as provided in the agreement, and orally told Reynolds of his demand, and Reynolds immediately went to the Bank and made additional payments. All of this is in the record in the case. The cancelled checks and receipts are all before this honorable Court.

The case was set for trial in Anchorage, Alaska, and the following took place:

Judge Denman of the Ninth Circuit Court of Appeals assigned the Honorable Edward P. Murphy, who was a regular United States District Judge in the Northern District of California, here to Anchorage to hold a term of Court, assisting the regular Third Division District Judge, the Honorable J. L. McCarrey, Jr. This case came up before Judge Murphy on a Motion for Summary Judgment for the defendants and a Countermotion for Summary Judgment for the plaintiffs. Judge Murphy heard some evidence, a transcript of which is included in the record appended hereto. He decided the case against the plaintiffs and forfeited the contract and ordered the property returned to the defendants, and even rendered a money judgment in favor of the defendants against the plaintiffs.

An appeal was taken to the Circuit Court of Appeals for the Ninth Circuit, and the decision complained of was rendered therein on the 4th day of April, 1957. A Petition for Rehearing was immediately filed, and was overruled on May 7, 1957.

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## JURISDICTION.

The jurisdiction of the Court of Appeals was set forth in the Brief, and admitted in the Answer Brief. Jurisdiction is conferred upon this Court to review this cause by Writ of Certiorari, by Sections 1254 and 2101 of the Judicial Code (Act of June 25, 1948, c 646, Sections 1254, 2101, 62 Statutes 828, 961, 28 U.S.C.A. 1254, 2101) and Rules 21, 22 and 23 of the Revised

Rules of the Supreme Court of the United States, adopted April 12, 1954, effective July 1, 1954, and other Court rules.

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**REASONS FOR GRANTING THE WRIT.**

*First Reason.* This case involved the legality of the order of the Chief Judge of the Circuit Court of Appeals sending in a regular United States District Judge to hold court in the DISTRICT COURT OF THE TERRITORY OF ALASKA, which is not a District Court of the United States and has been so held by this Court in *McAllister v. United States*, 141 U.S. 174, *United States v. Burroughs*, 289 U.S. 159-163, and *National Insurance Co. v. Tidewater Co.*, 337 U.S. 582-640, and this is a question of great importance to the people of Alaska, and the Circuit Court did not decide it on the law effecting the power of the Chief Judge to make the order assigning Judge Murphy to Alaska, but avoided deciding that question, when it was raised in the District Court of the Territory of Alaska, as well as in the Circuit Court of Appeals, and briefed on both sides. If he had no legal power to make the order, it was illegally made, and the Honorable Edward P. Murphy was without any jurisdiction, not a Judge de jure or a Judge de facto, and jurisdiction could not be created by waiver or estoppel. The whole question is undecided, and should be determined now by this Honorable Court and the question settled forever.

*Second Reason.* The decision is contrary to the decisions of the Supreme Court of the United States and many other respectable Courts.

*Third Reason.* The order made, assigning the Honable Edward P. Murphy to hold a term of court in Alaska, or to help the regular judge of the District Court of the Territory of Alaska in the Third Division, was beyond the powers of the Chief Judge of the Ninth Circuit Court of Appeals, and, there being no power to make the assignment, no jurisdiction was conferred, and, there being no law to authorize the assignment of Judge Murphy, the lack of jurisdiction could not be waived and jurisdiction could not be created by waiver or estoppel, the law making power being in Congress.

*Fourth Reason.* The District Court of the Territory of Alaska has been held by this honorable Court not to be a District Court of the United States (see citations in First Reason), and the Act authorizing the Circuit Court to assign District Judges of its Circuit, does not in any way authorize said Circuit Court to assign an outside Judge to hold court in the Territorial District Court of Alaska, which Court was created by an Act of Congress and was named and designated as the District Court of the Territory of Alaska, and the Judges are not Judges of the United States District Courts—they are appointed by a special Act, for a four-year term, and have a different jurisdiction from the District Courts of the United States.

*Fifth Reason.* While this action was still in the District Court of the Territory of Alaska, a Motion to Set Aside any and all orders made or any judgment rendered therein by the Honorable Edward P. Murphy, and to grant a new trial, was duly filed and came

on for hearing, and the Honorable Edward P. Murphy denied the Motion and entered the judgment as a judgment of the District Court of the Territory of Alaska, when he had no jurisdiction whatever in the premises.

*Sixth Reason.* This was commenced, prosecuted and determined as an equity action, equity being done by the Petitioners here, and equity being denied the Petitioners, which constituted deprivation of property without due process of law.

*Seventh Reason.* While the action was still pending in the District Court for the Territory of Alaska, the plaintiffs objected to the proposed Decree and to the Findings of Fact and Conclusions of Law in the case, and to the jurisdiction of Judge Murphy, and their objections were overruled and the Findings of Fact, Conclusions of Law and Decree, prepared by the defendants, were duly signed and filed as a judgment of the *District Court of the Territory of Alaska.*

*Eighth Reason.* All of these matters were raised in the District Court of the Territory of Alaska, were raised again in the Ninth Circuit Court of Appeals, and were at all times denied by the Court; and the plaintiffs, the Petitioners here, feel aggrieved by the decisions of the District Court and of the Ninth Circuit Court of Appeals; and, in good faith, they feel that justice has been denied them, that their property has been taken without due process of law, also against all of the rules of equity and justice, and in contravention of the Opinions and Decisions of the United States Supreme Court, and they petition this

Court for relief by granting Petition for Writ of Certiorari.

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## ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Honorable Edward P. Murphy was, at all times mentioned herein, a regular United States District Judge of the Northern District of California, located at San Francisco, regularly appointed, qualified and acting as such, there being no law that justifies or authorizes his being assigned, or acting as, a District Judge of the Courts of the Territory of Alaska, which is a separate, distinct and different Court from the District Courts of the United States.

The District Courts of Alaska were created by an Act of Congress, 48 U.S.C.A. 101, which established and named the Court THE DISTRICT COURT FOR THE TERRITORY OF ALASKA. The Act gave it concurrent jurisdiction with District Courts of the United States, and in addition, general jurisdiction in divorce cases, civil, criminal, equity and admiralty cases, regardless of the amount involved, citizenship or other restrictions, provided a different salary from that of judges of the United States District Courts, and specifically provided "EACH OF SAID JUDGES MUST RESIDE IN THE DIVISION OF THE DISTRICT TO WHICH HE MIGHT BE RESPECTIVELY ASSIGNED BY THE PRESIDENT." Congress divided Alaska into four Divisions, First, Second, Third and Fourth, and outlined them in Section 101 above mentioned.

Section 112, U.S.C.A. 48, provides for the judges to be appointed for a period of four years by the President of the United States, with the advice and consent of the Senate.

Chapter 130, Title 28, Section 292, U.S.C.A., provides for the Chief Judge of the Circuit to designate any district Judge of the Circuit to hold Court IN ANY DISTRICT WITHIN THE CIRCUIT.

Chapter 13, Section 333, Title 28, provides for the calling of conferences of all of the District Judges of the Circuit who are residing WITHIN THE CONTINENTAL UNITED STATES (and Alaska has repeatedly been held not to be within the continental United States).

Chapter 21, Section 451, Title 28, U.S.C.A., states:

> "The term District Court and District Courts of the United States means the courts constituted by Chapter 5 of this title."

and Chapter 5 designates and outlines the District Court fully and completely and *DOES* include in that list Hawaii, the District of Columbia and Porto Rico, but DOES NOT include Alaska or the District Courts of Alaska in any way. Therefore, we state there is no statute authorizing any Court to assign a regularly appointed, qualified and acting judge of the United States District Court to hold court in Alaska, any more than he could assign a State Court Judge from the States of Washington, Oregon or California to hold court in Alaska. Alaska is a separate jurisdiction, created by Congress and not by the Constitution of the United States as the United States District

Courts are. It is not even called or named a United States District Court, but is specifically named by Congress, its creator, as the District Court for the Territory of Alaska. This is also clearly shown by Chapter 17, Section 373, Title 28, U.S.C.A.

Section 134, Chapter 5, provides (a) the District Judges, except in Hawaii and Porto Rico, shall hold office during good behavior. This Section also excludes Alaska completely. You will find, under Definitions, that the District Courts of Alaska are not United States District Courts (see Section 451, Chapter 21, Title 28, U.S.C.A., page 462) but it specifically states: The term "Court of the United States" includes the Supreme Court of the United States, Courts of Appeal, District Courts constituted by Chapter 5 of this Title, including the District Courts of the United States for the Districts of Hawaii and Porto Rico, the Court of Claims, the Court of Customs and Patent Appeals, the Customs Court, and any Court created by Act of Congress, the judges of which are ENTITLED TO HOLD OFFICE DURING GOOD BEHAVIOR. An examination of Chapter 5 above referred to reveals that it specifically omits Alaska and the Judges thereof.

This honorable Court has held in the past, that the District Courts for the Territory of Alaska are not United States District Courts.

The first case directly in point is *McAllister v. United States,* 141 U.S. 174, which states "to be the Judge of the District Court of the District of Alaska is not a Judge of the Court of the United States"

and, in the body of the opinion, on page 184, there are several statements supporting the quotation above. This same position is taken by this Court in 289 U.S. 163 and 337 U.S. 640 above cited. Therefore, there being no statutory law authorizing the Chief Judge of the Circuit Court of Appeals to assign Judge Murphy to Alaska to hold Court as District Judge of the Territory of Alaska, he had no jurisdiction here, and jurisdiction cannot be created by waiver or estoppel, and therefore, he had no jurisdiction at all, and any act done by him while here was an absolute nullity, and, to allow his judgment to stand, is a deprivation of the plaintiffs' property without due process of law, as prohibited by the Constitution of the United States of America.

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**SUPPORTING SECOND CONTENTION WHY THE WRIT SHOULD BE GRANTED.**

This is an equity action, and the old maxim that, "he who comes into a Court of Equity must come with clean hands" and the defendants' hands being slimy with fraud and having obtained the Deed and Contract from the escrowee by misrepresentation, by claiming that the payments had not been made, when the defendants knew that the payments were made in advance, and after more than 2/3 of the purchase and sale price of the property had been received by the Sellers, the Defendants herein, and the balance due on the contract of purchase having been tendered in open court, and on the theory that "equity abhors a forfeiture", the Decree of Judge Murphy is in direct violation of all of the equitable decisions of this hon-

orable Court, and was especially opposed to the equity decision of the Honorable Anthony J. Dimond, a District Court opinion in the case of *Skellinger v. Fox,* which decision was affirmed by the Ninth Circuit Court of Appeals in *Fox v. Skellinger,* 216 Fed. 2d 534.

It is to be noted that, in the case at bar, the Circuit Court of Appeals' decision is based upon the failure of the plaintiffs to procure and deposit the insurance policy in the Bank of Homer, and the undisputed fact is that the insurance was purchased on the 10th day of October, which was three days prior to the defendant Lentz even attempting to declare the contract forfeited, and, with no written notice of his intention to forfeit the contract being served, giving the purchasers a chance to meet any requirement that Lentz complained of, amounted to an unauthorized act of forfeiture on the part of Lentz. The undisputed fact is that Lentz made an oral request that the insurance be purchased, on the 10th day of October, 1954, and that immediately an insurance policy was purchased, in the sum of Five Thousand Five Hundred Dollars ($5,500.00), with the acquiescence of Raymond V. Lentz, which was more than adequate to cover any balance due on the purchase price of the property. All of these things are established by the evidence in this case, and, in equity and good conscience, the Court should grant relief to innocent purchasers, such as J. C. Reynolds and Agnes M. Reynolds were and are in this case.

This case, due to the effect it will have on the assigning of judges to the Territory of Alaska, was very

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important, and the Circuit Court of Appeals made an order submitting the case on typewritten record and briefs, which was done, and therefore the record and briefs are not printed, but Petitioners offer to have them all, or any part thereof, printed and submitted upon order of this Court.

55 Am. Jur. 1020, Sec. 637:

> "... While it is beyond question that a vendor may by his words or affirmative acts preclude himself from insisting upon an immediate forfeiture ..."

which the record shows happened here.

The course of proceedings indulged in by both of the parties, shows Mr. Lentz obtained from the Buyer, Reynolds, Petitioner herein, a considerable sum of money in advance of any payments being due, and the evidence conclusively shows that Lentz received the money and then entered into the conspiracy with Henry Anderson whereby he deeded the sold property to Henry Anderson, whereby he was to get Ten Thousand Dollars ($10,000.00) for the transaction, and did attempt to work a forfeiture and was apparently able to get the Contract and Deed out of the Bank of Homer (however, it was later recovered by the Bank of Homer). If his position was tenable, he should then have given notice to Reynolds in writing, giving him a reasonable time to meet what he contended to be breaches of the contract. This was never done — not even in the slightest — and in support of that statement we call your attention to *United States v. Stott, et ux,* 140 F. (2d) 941, and, from page 944, we quote:

"Where the vendee in an executory contract for the purchase of land is entitled to a reasonable time for completion of the transaction and steps towards completion have been taken, the vendor cannot put an end to the contract without notice to the other party of his intention so to do, after which the party in default has a reasonable time in which to perform his obligations under the contract . . . . Moreover, the right to abrogate a contract may be waived by continuing to treat it as a subsisting obligation, as the appellees did here, by their insistence upon performance and their willingness to accept it until the date of attempted abrogation. * * *"

We contended in the court below, and contend here, that there was a definite waiver of the terms of the contract with relation to insurance which was positively made by the Sellers, and we call your attention to *Boswell v. United States,* 123 F. (2d) 213. In this case the Court said:

"In such a case where time is not of the essence, one wishing to rescind for delay must give notice of his intention so to do and allow a reasonable time . . . *Even where time is of the essence, it may be waived and where as here, it has been, notice of intention and reasonable time to perform must be given.* * * *" (Emphasis ours.)

We will not extend this brief by citing the many State Court decisions, but we contend the universal rule is that where time is of the essence and the Buyer has defaulted on payments when due, and the condition is waived, the Buyer has a reasonable time in which to perform before forfeiture can take place,

and NOTICE MUST BE GIVEN BY THE SELLER TO THE BUYER THAT HE IS IN DEFAULT.

Other cases holding the same, or similiar, position are *Community Industrial Land Co. v. Walker*, 142 P. (2d) 757:

> "... *and it was therefore necessary for the respondent to give notice to the appellant before it could again require strict performance or claim a forfeiture for failure in that regard.*" (Emphasis ours).

Another California case, *McLane et al v. Van Eaton, et al*, 141 P. (2d) 783, where there was a slack method used, the Court held "that the forfeiture could not be declared without giving notice and an opportunity to correct."

This is also true in *Grider v. Turnbow*, 94 P. (2d) 285. This is the most elaborate opinion on the question that we have been able to find.

In *Bulmon, et ux v. Bailey, et al*, 156 P. (2d) 231, time of payment was waived, and, to restore it, notice was necessary. This is the rule in the following cases also:

*Miller v. Smith*, 267 N.W. 862;
*Bemmelyn v. Moss, et al*, 197 A. 6;
*Kerney v. Johnson*, 144 A. 808;
*In re Schilling*, 26 F. Supp. 248;
*Branch v. Lee*, 159 S.W. (2d) 677;
*Rynhart v. Welch, et al*, 65 P. (2d) 1420;
*Scott v. Molter*, 119 S.W. (2d) 603.

Also *Hall v. Nordgren*, 81 P. (2d) 857, from which we will quote a small portion from page 859:

> "It is settled in this jurisdiction that if a vendor has waived strict performance of a contract, *the forfeiture of the contract cannot be claimed without notice and a reasonable opportunity given to perform . . .* " (Emphasis ours).

This is supported by *Young v. Fitts*, 157 S.W. (2d) 873, and *Clayton v. Fletcher Savings & Trust Company*, 155 N.E. 539, which holds that forfeiture is a harsh remedy, not favored in equity. Also *Hill, et al v. Rogers, et al*, 99 N.E. (2d) 270, *Coca Cola Company v. Dixie Cola Laboratories, Inc.*, 30 F. Supp. 275, and *United States v. Smith*, 95 F. Supp. 623.

We therefore respectfully petition this honorable Court to grant the Writ of Certiorari prayed for herein.

Dated, Anchorage, Alaska,
May 16, 1957.

J. C. REYNOLDS,
AGNES M. REYNOLDS,
*Petitioners.*
BELL, SANDERS & TALLMAN,
By BAILEY E. BELL.
*Attorneys for Petitioner.*

**(Appendix Follows.)**